United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 14, 2005

S.A.M.
TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Stanford Hospital & Clinics and
Lucile Packard Children's Hospital
Case 32-CA-21170-1

530-6067-4001-8500
530-8045-5000
530-8054-2050
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This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act by unilaterally changing an extra-contractual past practice to impose a six-month cap on providing health and welfare contributions for unit employees who were on workers compensation leaves of absence.[1]

We conclude that complaint should issue in the instant case, as the Employer implemented its proposed six-month cap prior to reaching either impasse or agreement with the Union, and the Union did not clearly and unmistakably waive its right to bargain about the change. Complaint is particularly appropriate in the instant case, as it would give the Board the opportunity to discuss whether its continuing application of its extant "clear and unmistakable waiver" standard should be modified.

FACTS

Stanford Hospital and Clinics and Lucile Packard Children's Hospital (the Employer) is engaged in the operation of two separate but affiliated acute-care hospitals and related medical clinics in Palo Alto, California. The two hospitals merged in 1997. In November 1998, Service Employees International Union Local 715, AFL-CIO (the Union) was certified as the representative of a unit of about 1200 non-professional service and patient care employees at the two hospitals. Since that time, the

[1] The Region originally issued complaint in the instant case. Prior to the scheduled March 2005 hearing, however, the Region withdrew the complaint, undertook additional investigation and review, and submitted this matter for advice.

parties have negotiated two collective bargaining agreements, the most recent of which is effective by its terms from December 19, 2002 through November 4, 2005.

The parties' collective-bargaining agreement contains a "Management's Rights" article which gives the Employer the right to "promulgate, eliminate, or revise reasonable rules and regulations relating to the terms and conditions of employment and the manner of operations, provided that they do not conflict with the express provisions of this Agreement." This clause also states that "[t]he Employer may, in its discretion, continue any current policies and practices which do not conflict with express written provisions of this Agreement."

Moreover, the agreement contains a "Waiver" clause which states:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and the understandings and agreements arrived at by the parties after the exercise of the right and opportunity are set forth in this Agreement. The Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other will not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

The "Benefits" article of the parties' collective-bargaining agreement provides that "regular and fixed term" unit employees are eligible to participate in the health and welfare benefit programs set forth in the contract, subject to the terms and eligibility requirements set forth in each plan. Regular employees are defined as employees who work 40 or more hours in each 14-day calendar period.

The "Leaves Of Absence" article states that employees are eligible for leaves of absence from the Employer "in accordance with the specific terms and conditions set forth in the Employer's then current policies for leaves of absence, unless specifically modified in this agreement."

While the collective bargaining agreement and the actual plan documents are silent on the subject of a cap on benefits contributions, the Employer does promulgate and maintain certain other documents that refer to a six-month cap. The Employer's "Employee Handbook Summary" lists the types of available leaves of absence, including workers compensation, and then states that "benefits coverage will not exceed 6 months in any 365 calendar day period unless otherwise required by law.[2]" The same document also states that benefits end during an approved leave of absence after six months. Similarly, the Employer's April 1, 2001 booklet entitled "Using Your Handbook and Benefits Program" states that while an employee is on an approved leave, benefits will end after six months. Finally, the Employer maintains an Administrative Policy Manual which contains a section entitled "Leaves Of Absence." The current version of the Manual was first promulgated in August 1998, prior to the certification of the Union. It states that employees who are off work on approved leaves of absence are eligible to continue participating in their benefits plan for six months, at which time they will be eligible for COBRA coverage. The Manual lists the types of approved leaves, and it specifically refers to leaves due to work-related illnesses and injuries (workers compensation).

While these provisions of the Employer's employee handbook, Administrative Policy Manual, and benefit program documents promulgated prior to the Union's certification set forth a six-month benefit cap for employees on workers compensation leave, it is undisputed that, since the time of its initial 1997 merger, the Employer has in fact had a policy and practice of paying its share of the health and welfare contributions for unit employees who were on workers compensation leaves of absence for the duration of such leaves, even if the leave exceeded six months in length.

The Employer's counsel has explained this contradiction by representing that one of the predecessor entities had a six-month cap prior to the merger, but that the combined entity adopted a common policy of not having such a cap at the time of the merger. This decision was based upon legal advice regarding certain decisions of the California State Workers Compensation Appeals Board (WCAB) in which the WCAB took the position that an employer's termination of health insurance benefits while an employee

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[2] This document was issued and revised prior to the certification of the Union.

was on workers compensation disability was discriminatory under the State's Labor Code.[3]

In February 2002, the WCAB changed its position and ruled that any claim under state law that an employer unlawfully terminated contributions to an ERISA group health benefits plan was preempted by ERISA.[4]

On October 15, 2003, Treva Davis, the Employer's Director of Labor and Employee Relations, sent the Union a letter with a one-page attachment entitled "Benefits During Work-Related Medical Leaves Of Absence." In this attachment, the Employer stated:

> Effective January 1, 2004, employees who are on a leave of absence due to a work-related illness, injury, impairment, or physical or medical condition will be covered by the current benefit coverage provisions as described in HR Policy Leaves Of Absence dated August 1998 (the Manual).
>
> According to our policy, employees on a work-related or non work-related medical leave of absence can elect to continue benefits coverage during the first six months of a medical leave of absence by continuing to make any employee contributions that they would have been making while actively working.
>
> * * * * *
>
> Previously, our policy was not fully implemented regarding work-related medical leaves because the California State Workers' Compensation guidelines discouraged employers from discontinuing payment of health insurance premiums at anytime during the leave of absence even though the employer may have discontinued premium payments for non-work related leaves of absence at six months.
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> On February 13, 2002, the Workers' Compensation Appeals Board adopted the position that employers were essentially able to treat work-related medical leaves of absence benefits in the same

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[3] See, e.g., Maraviov v. Tenet Health Systems Hospitals, Inc., 25 Cal. Workers' Comp. Rptr. 341 (1997).

[4] Navarro v. A&A Farming, 67 Cal. Comp. Cases 145 (2002).

> manner as they treated non-work related medical absence benefits.
>
> For the purpose of alleviating employee hardships, we have a transition plan for employees who are currently on a work-related medical leave of absence or who go out on a work-related medical leave of absence prior to January 1, 2004. These employees will be "grandfathered" effective January 1, 2004 by giving them a six-month notice that their benefits will be subject to COBRA coverage beginning on July 1, 2004.[5]

The October 15, 2003 letter also advised the Union that the Employer was proposing to change the spousal contribution premiums.

Beka Langen, the Union's Worksite Organizing Director, responded to this letter with a letter dated October 31, 2003. In this letter, Langen requested bargaining over the cap and asked for certain necessary information. Langen indicated that she would be on vacation until November 10, 2003, and would not be available to meet until after that date.

On November 17, 2003, Davis e-mailed Langen the requested information, advised her that the Employer was willing to bargain, and asked Langen to provide dates she would be available for bargaining. On November 25, 2003, Langen telephoned the Employer to request bargaining as soon as possible. On November 28, the parties agreed to set the first meeting for December 5, 2003.

The December 5, 2003, meeting lasted about an hour. The vast majority of the meeting was spent discussing the increase in spousal premiums, an issue that both parties recognized as having a much greater impact on the unit employees than the six-month cap. However, towards the end of the meeting, Langen stated that the Union would agree to a 12-month cap. Davis responded by stating that the Employer would think about it and then get back to the Union.

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[5] On January 1, 2004, the Employer also imposed a six-month cap on its non-represented employees. The Employer has taken a consistent position in a number of areas that it wants to maintain equality between the benefits it offers to its represented and non-represented employees.

The parties met for a second time on December 16, 2003. This meeting also lasted about an hour, and most of it was again spent discussing the spousal premium increase. The only discussion of the six-month cap issue came when Davis stated that the Employer rejected the Union's proposal for a 12-month cap, that the Employer was going to comply with the law, and that the Employer thought a six-month cap was fair. Langen responded that she did not agree with the Employer's position.

The next day, December 17, Langen sent the Employer a letter with a counter-proposal for a 10-month cap. Langen also stated that she would be out of the office until December 29, 2003, but would be available to meet after that date.

Davis next responded with an e-mail dated January 2, 2004. In this e-mail, Davis stated that the Employer had carefully considered the Union's proposals on both the spousal premium and the six-month cap issues, but rejected them. The letter continued, "[i]nasmuch as we have more than satisfied our obligation to meet and bargain under the Agreement, but have been unable to come to agreement, we will be implementing the same benefits and practices for our SEIU bargaining unit employees as we are implementing for all other employees. The effective date of implementation is January 1, 2004."

Langen responded with a January 6, 2004 letter in which she stated that she did not believe the parties were at impasse, urged the Employer to meet to negotiate further, and asked the Employer to give her available dates for bargaining.

Davis replied by e-mail on January 7, 2004. With regard to the six-month cap issue, Davis stated that there is no contractual provision addressing this issue in any way, and that the Employer believed it had the right to make this change under the provisions of the parties' agreement. Davis stated that the Employer had given the Union ample notice of the intended change in policy, had met with the Union to hear its proposals even though not obligated to do so, and that the Employer had reached the conclusion that the Union offered no compelling rationale why the cap should be different for unit and non-unit employees. Davis concluded by stating that, "[w]hile we doubt that you can offer practical proposals that would be consistent with our stated positions, . . . if you believe that you can do so, please so advise me and we will be willing to meet again to receive and consider your proposals and hear your rationale . . . As regards the workers comp leave benefit continuation issue, since no

employee has yet been affected by the change, if you have some other proposal that we find acceptable, then the change can be made at that time."

Langen replied with a January 15, 2004, letter which stated that she would like to have another meeting to continue negotiating over the spousal premium and six-month cap issues. Langen concluded by stating that the Union had room to move from its latest proposal and she requested available dates to meet.

Davis responded with a January 22, 2004, e-mail stating that, if the Union has some other proposal, "while we are not obligated to bargain with you over changes to our work rules, please give us your proposal, together with any additional issues and concerns, and we will listen to and consider them, and give you a response. Davis concluded, "[a]t this time, I am available to meet on January 23 or January 30 at any time."

The Union did not respond to Davis' January 22, 2004 e-mail. No further bargaining sessions or correspondence on the cap issue have taken place since that time.

On January 22, 2004, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(5) of the Act by unilaterally changing its extra-contractual past practice regarding providing health and welfare contributions to unit employees who were on workers compensation leaves of absence prior to reaching either impasse or agreement with the Union.

ACTION

We conclude that complaint should issue in the instant case, as the Employer implemented its proposed six-month cap prior to reaching either impasse or agreement with the Union and the Union did not clearly and unmistakably waive its right to bargain about the change. Complaint is particularly appropriate in the instant case, as it would give the Board the opportunity to discuss whether its continuing application of its extant "clear and unmistakable" waiver standard should be modified.

The Employer's unilateral change violated Section 8(a)(5)

Initially, we conclude that the Employer violated Section 8(a)(5) under extant Board law as it implemented its proposed six-month cap prior to reaching either impasse or agreement with the Union and the Union did not clearly and unmistakably waive its right to bargain about the change. Thus, we agree with the Region that the imposition

of the six-month cap was a unilateral change that required bargaining with the Union.[6] While certain provisions of the Employer's employee handbook, Administrative Policy Manual, and benefit program documents promulgated prior to the Union's certification set forth a six-month benefit cap for employees on workers compensation leave, it is undisputed that, since the time of its initial 1997 merger, the Employer has had an express policy and practice of paying its share of the health and welfare contributions of unit employees who were on workers compensation leaves of absence for the duration of such leaves, even if the leave exceeded six months in length. The Employer's change in that policy and practice required it to bargain with the Union.[7]

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[6] We further agree with the Region that nothing in the parties' agreement or bargaining history would have prevented the Employer from lawfully implementing this unilateral change in an extra-contractual past practice had the parties bargained to a bona fide impasse, and that the Employer's extra-contractual past practice of providing uncapped benefit contributions for employees on workers compensation leave had not ripened into an implied contractual term that could not be changed absent agreement.

[7] The fact that the Employer's imposition of the six-month cap was permitted by the WCAB's change in position regarding the requirements of the state's workers compensation law does not change this conclusion. As the Board has repeatedly held, "the [change] of the law did not mean that the Respondent was required to end the practice. The issue of whether it would or would not end the practice should have been resolved in bargaining." AT&T Corp., 325 NLRB 150 (1997). See also, e.g., SGS Control Services, Inc., 334 NLRB 858 (2001), in which the Board found that an employer had made a change that would have required bargaining (if it had been made after the union's election) by discontinuing its practice or making overtime payments for hours worked in excess of eight in a day, as formerly required by state law. The Board, over former Chairman Hurtgen's dissent, would have found such a bargaining obligation despite a provision in the employer's handbook stating that it only pay overtime for hours worked in excess of 40 in a week, "[e]xcept where otherwise required by law." Thus, the Board majority would have found a change that required bargaining despite the employer's

We also agree with the Region that the parties were not at impasse when the Employer unilaterally implemented the change in its benefit contributions policy on January 2, 2004. Thus, the parties had only briefly discussed the matter in two bargaining sessions, the Union had already made significant movement, proposing a cap of 12 and then 10 months, the Union expressed its willingness to make further movement in subsequent bargaining, and neither party has made a claim of bona fide impasse at that time.

We further conclude that while the evidence does not demonstrate that the Employer engaged in unlawful surface bargaining or presented the Union with a fait accompli incompatible with good faith bargaining prior to its implementation announcement, the Employer unilaterally implemented its benefits contributions proposal on January 2, 2004, in violation of Section 8(a)(5).[8] Thus, despite the fact that the parties were not at impasse on January 2, 2004, the Employer announced that it was implementing the change for bargaining unit employees as it was implementing for all other employees, effective January 1, 2004. In later communications, the Employer reiterated that it had in fact implemented the change and that it had no obligation to bargain with the Union over it, although it did offer to listen to, consider, and respond to any subsequent Union proposals, agreeing only that if it found some proposal acceptable the implemented rule could then be changed.

Moreover, while the parties had had only had two bargaining sessions, in which they only briefly discussed

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continuously maintaining a clearly articulated policy of only paying overtime for hours worked in excess of 40 in a week, but for the contrary requirements of state law. Here, a fortiori, a bargaining obligation adhered where the Employer actually changed its policy and practice in response to the requirements of state law, and subsequently desired to change the policy back after the state law changed.

[8] In this regard, it is well established that an employer may not defend against a unilateral change allegation by asserting that it was still willing to meet to discuss the change after it had been implemented. Board law is clear that a union cannot be forced to bargain up from this weakened position. See, e.g., S & I Transportation Inc., 311 NLRB 1388, 1390 (1993).

the matter, this did not constitute "inaction" by the Union that would privilege the Employer's unilateral action. Thus, the Employer first notified the Union of its proposal on October 15, 2003; the Union requested bargaining over the proposal by October 31, 2003. The Employer then did not provide the relevant information requested by the Union until November 17, 2003. Little more than a week after that, on November 25, 2003, the Union provided dates for bargaining; by November 28, 2003, the parties had agreed to meet a week later, on December 5, 2003, at which time the Union made a responsive counter-proposal. The parties met again less than two weeks later, on December 16, at which time the Employer rejected the Union's counter-proposal and reiterated its own initial cap proposal. The next day, December 17, the Union's representative offered another counter-proposal by letter, and said that she would be available to meet immediately after she returned to the office on December 29, 2003. Rather than continuing to bargain, the Employer instead implemented its proposal on January 2, 2004. At no time during this period did the Employer indicate any complaint about the pace of bargaining, or express any business exigency that would indicate that any agreement would have to be reached by January 1, 2004. Under these circumstances, the Union's conduct cannot be characterized as unreasonably dilatory tactics or inaction; rather, the Employer apparently had a schedule it wanted to keep for the change in its benefit contributions rules, and it chose not to wait for bargaining to be completed before it implemented it, even if that meant acting unilaterally. Only after the Employer's implementation did the Union stop bargaining and file the charge in the instant case. Thus, this case is properly distinguished from those in which a union chooses to forgo bargaining,[9] and the Employer was not privileged to act unilaterally, absent a clear and unmistakable waiver of bargaining rights by the Union.

There was no clear and unmistakable waiver by the Union

Finally, we conclude that the Union did not waive its right to bargain over this change in past practice. The Board has long held that the purported waiver of a union's bargaining rights is effective if and only if the relinquishment was "clear and unmistakable."[10] In

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[9] See, e.g., Bell Atlantic Corp., 336 NLRB 1076, 1086-1088 (2001); Boeing Co., 337 NLRB 758 (2002).

[10] See, e.g., Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("[i]t is well settled that the waiver of a statutory right

Metropolitan Edison Co. v. NLRB,[11] the Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."

In particular, a waiver of statutory rights will not be inferred simply because the contract contains a management rights clause or zipper clause.[12] The Board has stated that:

> Even where a zipper clause is couched in broad terms, it must appear from the evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter.[13]

Thus, while the Board may find a contractual waiver of the right to bargain over changes in past practices which were not discussed in bargaining, it will do so only where there is specific language in the contract privileging the Employer's action or where the zipper clause in the contract specifically provides that the agreement supersedes all past agreements, understandings, and practices. For example, in Columbus Electric Co.,[14] the

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will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable").

[11] 460 U.S. 693, 708 (1983).

[12] Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3rd Cir. 1983); Kay Fries, Inc., 265 NLRB 1077, 1084 (1982), enfd. 722 F.2d 732 (3d Cir. 1983).

[13] Angelus Block Co., 250 NLRB 868, 877 (1980), citing Rockwell-Standard Corporation, 166 NLRB 124, 132 (1967), enfd. 410 F.2d 953 (6th Cir. 1969); Radioear Corporation, 214 NLRB 362, 364 (1974). Cf. GTE Automatic Electric Inc., 261 NLRB 1491, 1491-1492 (1982) (employer was privileged to invoke a zipper clause as a shield against the union's midterm demand for bargaining over a new benefit sought by the union, despite the fact that there was no discussion about the benefit - which had not yet been contemplated - in contract negotiations).

Board found that the employer did not violate Section 8(a)(5) by discontinuing non-contractual Christmas bonuses because a zipper clause therein clearly and unmistakably privileged this conduct. An examination of the bargaining history and contract language revealed that the parties clearly agreed that the provisions of the collective-bargaining agreement would supersede all prior agreements and understandings, i.e., would "wipe the slate clean," and that the collective-bargaining agreement would govern the parties' "entire relationship" and be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise."[15] Similarly, in TCI of New York,[16] the Board reached the same conclusion where the parties' contract contained the following provision:

> This Agreement fully and completely incorporates all such understandings and agreements and supersedes all prior agreements, understandings and past practices, oral or written, express or implied.

Based on the plain language of the contract and the union's failure to "explore the meaning or purpose of this clause," the Board found that the union by, "accepting such a strongly worded clause," knowingly agreed to have the current agreement supersede all past practices, including the provision of bonuses.

Absent such specific language, however, it is clear that no waiver will be found unless there is evidence that the union "consciously yielded" the right to bargain over a particular issue. Such a "conscious yielding" may be found where the parties discussed an issue but did not include it in an agreement with a zipper clause, or where there is evidence that the union realized the zipper clause would

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[14] 270 NLRB 686, 687 (1984), enfd. sub nom. Electrical Workers IBEW Local 1466 v. NLRB, 795 F.2d 150 (D.C. Cir. 1986).

[15] Id., at 686-687. The employer there also sent a letter, in response to interrogatories by the union concerning the zipper clause language, which stated: "[T]o avoid any misunderstanding as to the Company's intention . . . we wish to terminate all [past] agreements . . . our 8(d) notice was to wipe the slate clean before the new contract goes into effect."

[16] 301 NLRB 822, 823 (1991).

permit unilateral employer action as to the type of employment condition at issue.[17]

Here, in contrast, the "Waiver" provision (the parties' zipper clause) does not clearly demonstrate a waiver of the right to bargain over changes in the established non-contractual past practice regarding benefits contributions. The provision states that neither party will be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, but it does not purport to supersede, invalidate, or even address extra-contractual past practices; this is not the kind of language which the Board has held to be, in and of itself, a clear and unmistakable waiver of the union's right to bargain over employer changes in extra-contractual past practices. For this reason, the cases cited above and cited by the Region in which the Board relies on such language to find waiver are inapposite. Therefore, under extant Board law, there was no clear and unmistakable waiver, and the Employer was required to bargain regarding the change in its past practice regarding benefit contributions.

Contract coverage analysis

We recognize, however, that some Circuit Courts and individual Board members have criticized or rejected the Board's clear and unmistakable waiver standard in unilateral change cases involving a claim of contractual privilege, arguing instead that a "contract coverage" analysis must be applied.[18]

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[17] See Radioear, 214 NLRB at 364 (union consciously yielded right to bargain over non-contractual turkey bonus when it proposed a provision that would have required the maintenance of existing non-contractual benefits, and then agreed to execute a contract that did not contain that provision and contained a zipper clause waiving the right to bargain over any subjects not covered by the agreement); Johnson-Bateman, 295 NLRB 180 (1989) (drug testing program was not even mentioned during contract negotiations, so it could not have been "consciously explored" and the right to bargain waived).

[18] See, e.g., NLRB v. U.S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993), denying enforcement to 306 NLRB 640 (1992); Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992), denying enforcement to 304 NLRB 495 (1991). See also Department of Navy v. FLRA, 962 F.2d 48 (D.C. Cir. 1992)(same analysis under federal service labor-management relations statute); Gratiot Community Hospital v. NLRB, 51 F.3d 1255 (6th Cir. 1995) (denying enforcement in

Contract coverage analysis is premised on Section 8(d)'s provision that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be re-opened under the provisions of the contract."[19] Thus, once the parties have exercised their right to bargain about a particular subject by negotiating the provision into the contract, the parties' rights are fixed, and further bargaining is not required as to that subject.[20] Under the contract coverage analysis, once a matter is "covered by" the labor agreement, "the union has exercised its bargaining right and the question of waiver is irrelevant."[21]

The difference between the two approaches can be seen in the D.C. Circuit's lead contract coverage case, NLRB v. U.S. Postal Service, supra, in which the Board had found that certain service reductions amounted to a decision to

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unilateral change case where Board had applied clear and unmistakable waiver standard, but not clearly rejecting the Board's approach in all such cases).

Other circuits, however, have approved the Board's use of the clear and unmistakable waiver standard in unilateral change cases involving a claim of contractual right. See, e.g., Bonnell/Tredegar Industries, Inc. v. NLRB, 46 F.3d 339 (4th Cir. 1995); NLRB v. U.S. Postal Service, 18 F.3d 1089 (3d Cir. 1994); Olivetti Office USA v. NLRB, 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991); NLRB v. United Technologies Corp., 884 F.2d 1569 (2d Cir. 1989).

[19] 29 U.S.C. 158(d). The phrases "contained in" and "covered by" are synonymous. See Department of Navy, 962 F.2d at 54.

[20] Local Union No. 47, IBEW, 927 F.2d 635, 640 (D.C. Cir. 1991) (citing United Mine Workers, Dist. 31, 879 F.2d at 944; IBEW, Local 1466 v. NLRB, 795 F.2d at 155).

[21] Department of Navy, 962 F.2d at 57. See also Local Union No. 47, IBEW, 927 F.2d at 641 (if "contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the clear and mistakable' intent standard is irrelevant").

reduce work hours that required bargaining, rejecting the employer's contract authorization claim based on a broadly-worded management rights clause. The Board held that the union had not waived its right to bargain over the service reductions because the management rights clause "neither on its face nor as interpreted by the arbitrators whose decisions were received into evidence, specifically refers to the type of employer decision or mentions the kind of factual situation presented here."[22]

Applying the contract coverage test, the D.C. Circuit denied the Board's enforcement petition. The court held that the service reductions were within the "clear compass" of the management rights article, which granted the Postal Service the exclusive right "to transfer and assign employees," "to determine the methods, means, and personnel by which [its] operations are to be conducted," and "to maintain the efficiency of the operations entrusted to it."[23] The court concluded that such rights "surely permit an employer unilaterally to rearrange its employees' work schedules."[24]

Similarly, in Chicago Tribune Co. v. NLRB, supra, the Seventh Circuit granted the employer's petition to review a Board order that found an 8(a)(5) violation resulting from the employer's unilateral adoption of standards regulating employee involvement with drugs and alcohol, including off-the-job illegal drug activities or alcohol addiction. The employer defended its action based on the contract's management rights clause, which authorized the employer to "establish and enforce reasonable rules and regulations relating to . . . employee conduct."[25] The Board found that the employer's right to act unilaterally with respect to "employee conduct" lacked "the specificity to constitute a waiver of the right to bargain over the implementation of discipline for drug-related conduct occurring when the employee is not on the job."[26]

The Seventh Circuit disagreed with the Board's analysis, finding that:

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[22] 306 NLRB at 643.

[23] Postal Service, 8 F.3d at 838.

[24] Id., at 838.

[25] 304 NLRB at 495.

[26] Ibid.

> The union had a statutory right to bargain over the terms of employment, of which a provision regulating behavior off the job was one, but it gave up that right, so far as the subjects comprehended by the management-rights clause were concerned, by agreeing to the clause. We have a simple question of interpretation -- and do not see how the Board could draw the line between on-the-job and off-the-job conduct. The clause gives management the exclusive right to establish reasonable regulations relating to employee conduct. There is no limitation to conduct on the job and even if there were, a regulation of conduct off the job could be "related" to conduct on the job and thus come within the scope of the clause.[27]

The Region should express the General Counsel's view that the Board needs to resolve the conflicts inherent in its clear and unmistakable waiver precedent

Notwithstanding the above and similar court decisions, the Board has continued to apply the clear and unmistakable waiver standard.[28] Given the enforcement problems presented by such rejections of its approach, however, the Board has also on repeated occasions indicated that the same result would obtain under a contract coverage analysis.[29]

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[27] 974 F.2d at 937.

[28] Thus, as recently as August 27, 2005, the Board reiterated that the "clear and unmistakable waiver" test was the Board's extant standard, albeit while finding it unnecessary to pass on that standard's continuing viability. Bath Iron Works Corp., 345 NLRB No. 33, slip op. at 3-4, 3 fn. 3 (2005).

[29] See, e.g., Klein Tools, Inc., 319 NLRB 674 (1995); Blue Circle Cement Co., 319 NLRB 661 (1995).

The Board has also pointed out, in discussions of why the same result would obtain using a contract coverage approach as it found using the clear and unmistakable waiver standard, that the analysis may be different when the change at issue is the alteration or modification of an established, albeit non-contractual, past practice than when the employer acts in a new area. See AT&T Corp., 325 NLRB at 150; Burns Security Services, 324 NLRB 485 (1997) (Member Higgins, concurring), enf. denied 146 F.3d 873 (D.C. Cir. 1998).

Moreover, while the Board as a whole has continued to adhere to the clear and unmistakable waiver standard in duty-to-bargain cases involving a claim of contractual right, several Board members have expressed their support for using the contract coverage approach in dissenting and concurring opinions.[30]

In addition to the manifest conflict with the court of appeals decisions that apply a contract coverage analysis, the Board's clear and unmistakable waiver precedents have not always shown themselves to be consistent, clear, or to have accorded sufficient weight to the parties' collective-bargaining agreements. Thus, for example, in Trojan Yacht,[31] the Board found no waiver where the collective-bargaining agreement provided that the parties:

> waive the right and agree that neither party shall be obligated to bargain collectively with respect to any term or condition of employment, or any other matter not related specifically to the administration of the express terms of this Agreement even though such other matter might not have actually been raised during the negotiation thereof, it being the stated intention of the parties to have their entire collective bargaining relationship for the duration of this Agreement set forth in its provisions.

In contrast, in Columbus Electric Co., supra, the Board found a waiver where the parties' agreement provided that it would govern the parties' "entire relationship" and would be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise."[32]

Based on such tensions in the Board's clear and unmistakable waiver precedent, as well as the conflict with the contract coverage approach used by some courts of appeals, the Board needs to resolve and clarify its

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[30] See, e.g., Exxon Research & Engineering Co., 317 NLRB 675, 676-677 (1995) (Member Cohen, dissenting), enf. denied 89 F.3d 228 (5th Cir. 1996); Teamsters Local Union No. 71, 331 NLRB 152, 153-154 (2000) (Chairman Hurtgen, dissenting).

[31] 319 NLRB 741, 741-742 (1995).

[32] 270 NLRB at 686-687. See also TCI of New York, 301 NLRB at 823.

approach in this area. In doing so, the Counsel for the General Counsel in briefs to the ALJ and the Board should urge the Board to avoid those conflicts that are merely semantic. Thus, it may not matter whether the standard is called "clear and unmistakable waiver," "contract coverage," or something else -- under either of these articulations, the Board must interpret the parties' agreement in the course of exercising its duty to determine whether an unfair labor practice has been committed. In this regard, the Board has authority to interpret contracts. The Supreme Court expressly approved the Board's exercise of its power in this regard, noting particularly the value of the Board's reliance "upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining" and that "the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context."[33]

The real issue is not whether the Board will interpret parties' agreements, but how it will do so; in dealing with the issue, which generally arises as an employer's affirmative defense that its unilateral action is privileged by the union's contractual agreement, the Board must take into account all of the relevant factors, including: (1) the wording of the proffered sections of the agreement(s) at issue, regardless of whether the language is general, specific, or even in some way ambiguous; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions in the collective-bargaining agreement or in other bilateral arrangements that may shed light on the parties' agreement concerning the change at issue. In all of these circumstances, the Board needs to interpret the parties' agreement to determine if the employer has a valid defense. In so doing, the Board will avoid conflicts with the several court of appeals decisions that apply a contract coverage analysis.

Accordingly, the Region should issue complaint in the instant case alleging that the Employer implemented its proposed six-month cap prior to reaching either impasse or agreement with the Union, and the Union did not clearly and unmistakably waive its right to bargain about the change. [*FOIA Exemption 5*

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[33] NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1967).

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B.J.K.